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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 344

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

v.

THE STATE OF FLORIDA ET AL.

No. 345

THE STATE OF FLORIDA ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA ET AL.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY.

Opinion of the Lower Court.

The opinion of the statutory District Court for the Northern District of Georgia, filed January 26, 1934, appears at page 349 of the printed record. We are unable to supply reference to the official report.

The final decree from which this appeal is taken, and which is based on the said opinion, appears at page 383 of said printed record.

Jurisdictional Statement.

The statement required by Rule 12 has been duly filed and probable jurisdiction was noted on October 8, 1934.

Statement of the Case.

This is an appeal from a final decree of the District Court of the United States for the Northern District of Georgia entered by that court on April 17, 1934, and adjudging that Atlantic Coast Line Railroad Company, appellant, pay to or for account of certain shippers of logs in Florida restitution of some $130,000, being a portion of the charges collected by appellant on shipments of logs during the period February 8, 1929—April 10, 1931. As appears in the 1934 opinion of this Court (*Florida* v. *United States*, 292 U. S. 13) appellant, during that period, charged and collected on said shipments the rates prescribed by the Interstate Commerce Commission by its 1928 order in Docket No. 18364, as necessary to be charged in order to remove a burden on interstate commerce.

After this Court, in January, 1931, in *Florida* v. *United States*, 282 U. S. 194, had determined that the said 1929 order of the Commission must be "set aside" for want of findings, which findings this Court said the Commission was "still at liberty" to make, and after the mandate of this Court had gone down, the Florida shippers filed in the said District Court motions praying that the said order of the Commission be "enjoined, set aside and annulled", and that the appellant be ordered to "restore to" said shippers the difference between the rates collected by this appel-

lant and the "lawful state rates", meaning thereby the Cummer scale of rates (R. 7, 11, 15).

Before any action was taken by the District Court on these motions, this appellant and the Georgia Public Service Commission had filed, with the Interstate Commerce Commission, motions praying that Commission to reopen said Docket No. 18364 and proceed to make the findings for want of which its order had been set aside by this Court. This fact was, by this appellant, brought to the attention of the District Court (R. 41).

Without waiting for action by the Commission, the District Court entered its decree of March 7, 1931, wherein it adjudged that the order of the Commission be "enjoined, set aside and annulled". Jurisdiction was reserved for consideration of the motions for restitution (R. 53).

The Interstate Commerce Commission, by its order of April 6, 1931, reopened Docket No. 18364 and set the proceeding for hearing at Jacksonville, Florida, on May 4, 1931. Appellant, on April 5, 1931, brought this fact to the attention of the District Court and prayed that court to withhold action pending action by the Commission in said reopened proceedings (R. 60, 62).

The District Court refused so to do, and by its decree of July 7, 1931, referred the matter to a master to ascertain and report the sums due by this appellant "as overcharges exacted" during said 1929-1931 period and measured by the difference between the amount collected by this appellant, being the rates prescribed by the Commission, and "the established lawful rate in force at the time each shipment was made" (R. 65-66).

In July, 1932, the Interstate Commerce Commission, by its report and order of that date (186 I. C. C., 157), made the findings which the District Court, by its opinion of February, 1933 (4 F. Supp., 477), approved, and which this Court in its April, 1934, opinion in *Florida* v. *United States*

held to be those for want of which the 1928 order had been set aside (292 U. S., 1, 9).

In November, 1932, the master made his first report to the court below in the restitution proceedings (R. 70). In this report he held the Cummer scale of Florida rates confiscatory and void, but also held that the orders of the Interstate Commerce Commission "whether passed before or since the decision of the Supreme Court are not admissible" as evidence of what was the proper charge and were "irrelevant and immaterial" (R. 90). The District Court by its decree of January 30, 1933, affirmed the report "so far as it has gone" and recommitted the matter to the master to report whether the charges made by this appellant were reasonable "as measured by the common law standard and if not what was the reasonable charge to be made" (R. 172).

In November, 1933, the master filed his second report in which he found that the charges made by this appellant, though the very rates prescribed by the Interstate Commerce Commission, were unreasonably high and that this appellant should restore to the Florida shippers 34% of the difference between the Cummer scale and the scale prescribed by the Interstate Commerce Commission by its 1928 order as to which the District Court had in the preceding February held that the findings made in the reopened docket were ample.

By its opinion of January 26, 1934, the District Court affirmed the report of the master (R. 349). In its "Findings of Fact" in said opinion, that court said:

> "In view of the experience of the Interstate Commerce Commission and its full and repeated consideration of these very rates, we should have inclined to think the rates which they fixed, first for interstate traffic and then for intrastate traffic on logs, ought to be accepted as the fair charge" (R. 353).

The court, however, refused to accept the rates so fixed by the Commission, stating:

> "If the ideal rates be those fixed by the Commission, the ideal might with reason and justice have been approached less precipitately" (R. 354).

Before the final decree was entered by the District Court, this Court had handed down its April 2, 1934, opinion in *Florida* v. *United States* (292 U. S., 1).

Appellant, by motion filed April 14, 1934, and before the District Court had entered its final decree, formally brought to the attention of that court the April, 1934, opinion of this Court; pointed out that the January, 1934, opinion of the District Court was inconsistent with the April, 1934, opinion of this Court, and prayed the District Court to withdraw its said January, 1934, opinion (R. 360).

The District Court without formally passing on the said motion, entered its final decree of April 17, 1934 (R. 383).

Appendix:

In order that the progress of these concurrent proceedings before the District Court in the restitution proceedings and before the Interstate Commerce Commission and the courts in the re-opened Docket No. 18364 may be clearly seen, there is attached an appendix to this brief showing on the left hand page the proceedings in this restitution matter, and on the right hand page the proceedings with reference to re-opened Docket No. 18364, with appropriate page references.

Scope of this Brief.

The errors assigned by this appellant appear in the printed record at pages 390 to 395. The points intended to be relied on are stated at pages 440 to 443.

This appellant relies on all of the points so stated, but will deal in this brief only with points one to six and point eight. The other points relied on will be treated in a separate brief.

By this brief appellant seeks to establish the following:

I.

The action of the lower court imposes on interstate commerce a burden which the Interstate Commerce Commission has found that commerce ought not to bear. This Court, by its January 1931 opinion "set aside" the 1928 order of the Interstate Commerce Commission for lack of appropriate intermediate findings to support the ultimate conclusion of the Commission with respect to the burden on interstate commerce caused by the Cummer scale of rates in Florida; but with the statement that the Commission is "still at liberty to make such determinations as the situation may require." The Commission immediately proceeded to reopen Docket No. 18364 and to make the findings for want of which its 1928 order had been set aside. This Court held the findings so made to be adequate and well sustained. The lower court, in error, proceeded on the assumption that the said 1928 order should have been annulled and held to be void, and on this assumption it erroneously proceeded itself to award restitution. (Points 1, 2, 3.)

II.

The lower court was entirely without jurisdiction to determine whether restitution was due by this appellant in the circumstances of this case; or itself to fix, as the rate which should have been charged during the 1929-1931 period, a rate different from that prescribed by the Interstate Commerce Commission as necessary to remove the burden on interstate commerce. (Points 4, 5, 6 and 8.)

III.

Equity will not permit its processes to accomplish a result declared by the Congress to be unlawful.

ARGUMENT.

I.

The action of the lower court imposes on interstate commerce a burden which the Interstate Commerce Commission has found that commerce ought not to bear. This Court, by its January 1931 opinion "set aside" the 1928 order of the Interstate Commerce Commission for lack of appropriate intermediate findings to support the ultimate conclusion of the Commission with respect to the burden on interstate commerce caused by the Cummer scale of rates in Florida; but with the statement that the Commission is "still at liberty to make such determinations as the situation may require." The Commission immediately proceeded to reopen Docket No. 18364 and to make the findings for want of which its 1928 order had been set aside. This Court held the findings so made to be adequate and well sustained. The lower court, in error, proceeded on the assumption that the said 1928 order should have been annulled and held to be void, and on this assumption it erroneously proceeded itself to award restitution. (Points 1, 2 and 3.)

This is the third time that this case, in one or another of its aspects, has been before this Court.

1. It first came here on an appeal from decrees of the District Court of the United States for the Northern District of Georgia, consisting of three judges, upholding an order of the Interstate Commerce Commission which declared that, on certain classes of logs, intrastate rates in Florida of the Atlantic Coast Line Railroad Company constituted an unjust and unlawful discrimination against interstate commerce; fixed the rates thereon which should

thereafter be charged therefor; and required the Atlantic Coast Line Railroad to cease and desist from charging for such intrastate transportation any other or different rates than those thus prescribed by the Commission.

This Court found that the Interstate Commerce Commission had the question adequately before it and did not exceed its authority in fixing the Florida intrastate rates, which were complained of, but that its authority had not been appropriately exercised because it had failed to make certain basic or essential findings that were required to support its order. This Court, in its opinion, indicated that the evidence to justify the necessary findings might already be in the record, but said that the Court was not called upon to examine the evidence to ascertain whether this was so. It, therefore, because of the lack of these affirmative and necessary findings by the Commission, set aside the Commission's order; stating that the Commission was "still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require." (*Florida* v. *United States*, 282 U. S. 194, 208.)

2. Thereupon the Commission by its order of April 6, 1931, reopened the proceedings (Docket No. 18364), reexamined the evidence in the record, afforded the parties in interest an opportunity to supplement it in any way desired, made certain affirmative findings, entered an order declaring the intrastate rates in Florida constituted an unjust burden on and an unlawful discrimination against interstate commerce, and fixed the same rates as those contained in its previous order as the rates which must be charged on the log traffic within the State of Florida in order to avoid such unjust burden and unlawful discrimination and constitute the lawful rates. This order was also attacked, was sustained by the District Court and an

appeal taken to this Court, which declared that the Commission had now supplied the findings that had previously been found to be lacking, and sustained the order. *Florida* v. *United States*, 292 U. S. 1, 8 and 9.

3. The first order of the Commission had expressly required the Atlantic Coast Line to cease and desist from charging any other or different rates intrastate in Florida on the log traffic in question than the rates fixed by the Commission.

Accordingly the railroad put in the rates required by the Commission and kept them in force until the adverse action of this Court on the first appeal (*Florida* v. *United States*, 282 U. S. 194). When such adverse action was taken by this Court, the rates prescribed by the Commission's order were taken out (292 U. S., at p. 3).

Shippers of logs affected by the rates thereupon applied to the District Court for restitution of the difference they had paid between the rates prescribed by the Commission's first order and what was known as the Cummer scale of intrastate rates in Florida (R. 7, 11 and 15).

The District Court, by its final decree of April 17, 1934, awarded restitution to them against the Atlantic Coast Line for the difference between the Interstate Commerce Commission's fixed rates and lower rates which the court, in the exercise of what it regarded as its equity powers and without action by the Commission, fixed as reasonable (R. 349). From this restitution order the appeal now before this Court was taken.

Transportation Act of 1920.

In order to determine the questions which arise on the present appeal, it may be helpful to consider the history and the general purpose and scope of amendments made to the Interstate Commerce Act by the Transportation Act, 1920 and ever since and now in force.

It should be borne in mind that the railroads were at first constructed as short lines to provide a way to neighborhood markets then customarily used by the shipping, receiving and consuming public.

During this early period they were so predominantly local in their relationships and service that it was natural and was considered appropriate to confine the exercise of the governmental power of regulation to the States, and it was not until the enactment by Congress of "An Act to Regulate Commerce," on February 4, 1887, that the essentially national character of their service was recognized as controlling and their regulation undertaken by the Federal Government under the commerce power of the Constitution. The *causa causans* of this enactment and its controlling purpose was to assure "equality of opportunity" to all users of these interstate agencies of transportation, so that persons and localities, similarly situated, might enjoy, in their business and affairs, equality of rates, facilities and service. While the fundamentals of regulation designed to secure these ends satisfied the public conscience, it soon came to be believed that the methods provided in the act for their enforcement were radically faulty and inadequate. It was objected that the act "had no teeth", and a state of pronounced dissatisfaction with the legislation grew up in the public mind. Accordingly, beginning with the Elkins Act in 1903, followed by the Hepburn Act in 1906, the Mann-Elkins Act in 1910, the Panama Canal Act in 1912, the Clayton Act of 1914, the Adamson Act in 1916 and other legislation, "teeth" were undeniably put into the national regulatory system, with the result, as expressed by Professor Daniel, of Yale, in his interesting book on "American Railroads", that "by this time the railroad Sampson had been rather effectively shorn by the Congressional Delilah." During this entire period there

was no recognition whatever of a duty or responsibility resting on the Federal Government growing out of the exercise of its regulatory powers to see that these essential agencies of transportation were kept up to the proper standard of adequacy and efficiency required by the public interest.

Adverse conditions, seriously menacing the power of the railroads adequately to serve the public, had assumed such magnitude that in 1915 an earnest effort, participated in by most, if not all, of the more important industrial interests of the Country and recommended by the President, was undertaken to bring about a new, comprehensive and thorough study of the whole transportation problem. This study was undertaken and was proceeded in, not for the purpose of promoting private interests, but solely for the purpose of promoting the public interest and of ensuring to the public an adequate and efficient system of rail transportation. In the course of this study, it was insisted that the credit of the carriers, on which their ability to perform their essential public service depends, is primarily a matter of profound and vital public concern; that the carriers were national, and not local, in their major aspects; that their ability to perform their public duties must not be destroyed by the uncoordinated, divergent and sometimes conflicting views of different governmental authorities; that the power of the States should not interfere with the power of the nation in dealing with and preserving in full vigor the agencies of interstate commerce, and that there must be a power in the National Government to require that intrastate commerce, when handled by these instrumentalities of interstate commerce, should contribute its fair share of the burden of supporting the agencies on which the two classes of commerce were alike dependent.

This resulted in provisions being incorporated in the

Transportation Act of 1920 to accomplish these high and essential public purposes.

In the Act, the definite and controlling purpose of Congress was to provide for an adequate and efficient system of interstate transportation, capable at all times of meeting and satisfying the transportation requirements of the public, and, to this end, it adopted, among others, the provisions of Section 1 in regard to the service that must be rendered; in regard to the prevention of waste of carrier credit by the building of unnecessary new, or the maintenance of unnecessary old, lines; in Section 20a in regard to overloading themselves with obligations which would interfere with the efficiency and adequacy of their service, provisions authorizing the Commission to fix minimum rates and in paragraphs 3 and 4 of Section 13 to ensure that intrastate commerce should bear its fair share of sustaining the instrumentalities of commerce engaged in performing both interstate and intrastate service.

The foregoing brief review has been given to point out and emphasize the fact that the provisions of the Act, involved in this case, conferring power on the Interstate Commerce Commission over State rates in certain cases, were enacted to accomplish not a private, but a public purpose deemed essential by Congress in the interest of adequate and efficient service and must be construed in the light of that fact. As hereinafter more fully pointed out, the courts will not permit their processes or power to be used to accomplish a purpose condemned in the most unmistakable way by Congress, namely, the purpose of establishing an undue, unreasonable or unjust discrimination against interstate commerce, which the Act in express terms, (Section 13(4)) forbids and declares to be unlawful.

The high purpose of these amendments is set out in many decisions of this Court.

In *Florida* v. *United States*, 292 U. S. 1, the Court said at page 5:

> "In *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585-587, we reached the conclusion that the provision of Section 13(4) for the removal of 'any undue, unreasonable, or unjust discrimination against interstate commerce' was not to be regarded as referring only to discrimination as between persons and localities. We held that Transportation Act, 1920, imposed an affirmative duty on the Commission 'to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States.' Intrastate rates, we said, must play a most important part in maintaining such an adequate system. If there was interference with the achievement of that purpose because of a disparity of intrastate rates as compared with interstate rates, the Commission was authorized to end that disparity. It was to be ended because it constituted an 'unjust discrimination against interstate commerce.'"

It is proper to note in this connection that Section 3 of the Interstate Commerce Act prohibited unjust discrimination against or in favor of particular persons, localities or descriptions of traffic, but did not prohibit unjust discriminations against interstate commerce. This omission was supplied by paragraph 4 of Section 13, which declares that any "undue, unreasonable or unjust discrimination," by State rates "against interstate or foreign commerce" • • • "is hereby forbidden and declared to be unlawful."

This prohibition against and declaration of unlawfulness of such State rates is absolute in terms—just as absolute in terms as the prohibitions of Section 3 as to the unjust discriminations there prohibited. While such State rates were thus in express terms forbidden and declared to be unlawful, a carrier could not, under the decision of the Supreme

Court in *Board* v. *Great Northern*, 281 U. S. 412, put into effect State rates that would avoid the unjust discrimination prior to action thereon by the Interstate Commerce Commission.

Accordingly, as the Florida State rates on logs were fixed by the Interstate Commerce Commission as the rates necessary in order to avoid unjust discrimination against interstate commerce, they were by force of the statute the lawful rates and any other lower rates would have been unlawful as constituting an unjust discrimination against interstate commerce, which the statute in terms prohibited and declared to be unlawful.

It was not for the carriers to determine that the action of the Interstate Commerce Commission, in the premises, was erroneous. The carriers' plain duty was to obey the Commission's order. That order was absolute in its terms and expressly required the carrier to cease and desist from charging on specified classes of logs moving intrastate in Florida, rates other than, or different from, those fixed by the Commission in its order. If the order had never been attacked in a court, it would have remained as a valid rule of conduct both on the part of the carrier and of the shippers. That the order was simply erroneous as a matter of procedure, and not void *ab initio*, will hereinafter appear. Setting aside the order was simply a method adopted by court of having completed a record which was held to be incomplete, and which could not have been completed with the order still standing.

The Instant Case.

Coming now more definitely to the case before the Court, it will be remembered that a proceeding was begun in 1926 before the Interstate Commerce Commission by the Georgia Public Service Commission, which filed a complaint against the Atlantic Coast Line Railroad Company, asking relief

against the carrier's *interstate* rates on carload shipments of logs from all Florida points to all destinations in Georgia and praying that the measure of such rates should be no higher than those concurrently in effect for the same kind of property moving in *intrastate* commerce in Florida.

The State of Florida was notified of the proceeding, and the Florida Railroad Commission appeared in defense of the Florida intrastate rates. There were a number of interveners, including shippers of logs in intrastate commerce in Florida, Georgia lumber companies, and railroad companies operating in Florida and between Florida and Georgia. All parties were fully heard by the Commission.

The Commission in 1928 made an order fixing the interstate rates, and finding that "the Florida intrastate rates assailed, which are lower than the interstate rates herein found reasonable for corresponding distances, result, and will result, in undue preference and advantage of shippers in intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce," and prescribed the same schedule of rates for intrastate commerce within the State of Florida as the schedule it had prescribed for the interstate commerce above referred to. Its order required the carrier to cease and desist from charging any intrastate rates on certain classes of logs in Florida other than the rates which the order fixed.

This order was assailed by the State of Florida and others before a three judge United States Court, which, "taking the view that, if construed so as to apply to intrastate rates throughout the State, the order *would* probably be invalid," rejected that construction and sustained the Commission's order upon a narrower construction, dismissing the bills.

Thereupon, the Interstate Commerce Commission clarified it first order, by expressly making it applicable throughout the State of Florida.

The case was then reopened before the three-judge court and fully heard.

The court, by a decision rendered March 22, 1929, upheld the amended order of the Commission as to intrastate rates not "because of undue prejudice to shippers and localities, or because of undue discrimination against the *particular* interstate commerce" in the described logs, but solely upon the ground that the order was aimed at a discrimination "against *general* interstate commerce," caused by intrastate rates which were so low as to throw an undue burden upon the interstate revenues of the carrier.

The case, as above stated, was brought on appeal to this Court, and was decided in *Florida* v. *United States*, 282 U. S. 194.

This Court held that the Commission had jurisdiction and that the proceedings before it were broad enough in scope to bring before the Commission and to justify it in determining the question whether the state rates referred to constituted an undue, unreasonable or unjust discrimination against interstate commerce and, if so, to authorize the Commission to remove the discrimination and to prescribe the state rates thereafter to be charged, the Court saying:

> "• • • the question now presented relates to the substance of the determination of the Commission and its support in the evidence rather than to mere matters of pleading and procedure. In making its order, the Commission could exercise all the authority conferred by the Interstate Commerce Act for the purpose of removing such unjust discrimination as was found to exist. If the Commission had made adequate findings supported by evidence upon the point under considera-

tion, we should not be disposed to conclude that the order must be upset because of the manner in which the proceeding was initiated or of the generality of the allegations of the complaint." (209.)

"The question in the present cases, then, is not one of authority, but of its appropriate exercise." (211.)

* * * * * * *

"* * * in order to sustain the state-wide order as to intrastate rates (as one needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system) it must appear that there are findings supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify that conclusion." (212.)

It was held that there was, in the case, "a lack of the basic or essential findings required to support the Commission's order," and because not supported by proper *findings*, the portion of the order under review, with respect to intrastate rates must be set aside and further proceedings had.

This decision of this Court was rendered January 5, 1931.

Meanwhile the Florida State rates on logs prescribed by the Interstate Commerce Commission were made effective on February 8, 1929, and remained in effect until April 10, 1931, when because of the decision of the Supreme Court above referred to, they were withdrawn and the scale in effect before the advance was restored.

After the decision of this Court above referred to was made, shippers who had paid the higher rates while in effect made claim in the cause pending before the three-judge court (which was a suit in equity) for restitution of

the difference they had paid between the old Cummer scale of rates and the advanced Interstate Commerce Commission rates. On this application for restitution, the three-judge court undertook itself to fix, without reference to any action by the Commission, what the proper intrastate rates in Florida should have been and to award restitution of the difference between the rates thus fixed and the advanced rates which the shippers had paid. The question in the present aspect of the case is whether such restitution should have been awarded and should now be paid.

Defect in First Order of the Commission.

In setting aside the order of the Commission, in the case referred to, (282 U. S. 194) the Supreme Court expressly based its action on "the lack of the basic or essential findings" by the Commission which are required to support its order. There was no determination by the Court that the Commission was without jurisdiction of the proceeding or of any other facts or conditions that would render the Commission's order void *ab initio*. In fact, the Court indicated that there might be already in the record ample basis for the essential findings which the Commission failed to make, the Court saying:

> "In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit." (Page 215.)
>
> "The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." (Page 215.)

After having thus indicated the error which the Commission had committed and that there might be in the record

complete justification for proper and adequate findings by the Commission, the Court proceeded with meticulous care to declare what, by its action, it intended to do and to define the legal status of the proceeding before the Commission which would result, by saying:

> "If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission *is still at liberty*, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require." (p. 215.) (Italics ours.)

Undoubtedly this referred to an order which might properly be entered, and determinations which might properly be made, in the pending proceeding and on the existing record.

This Court would, of course, not have made this statement if it were dealing with action which the Commission might take as to conditions existing after the Court's decision, because it is too obvious that the Commission might take any action authorized by the statute as to future conditions for the Court to think it necessary to deal with that aspect of the matter. What the Court was saying was that the Commission, notwithstanding the Court's decision, was *still at liberty* to make the findings which it might originally have made, but erroneously failed to make, in regard to the conditions presented *at the time of the original record* before it and was *still at liberty* to make such findings *nunc pro tunc* as it could then have made with respect to such State rates and as to the rates thereafter to be charged. The proceeding was sent back to the Commission for re-

hearing and re-examination by the Commission with the status of a re-hearing of a case in court. In legal effect, the Supreme Court's order was not to declare the order of the Commission void *ab initio*, but to reverse it for error, and to send the case back to be proceeded with in accordance with the principles laid down by the Court.

Ordinarily when a case is sent back for rehearing because of the commission of error in the first judgment, the rights of the parties are determined on the rehearing as of the time of the original complaint. This should doubly be so when not only the rights of a private party to additional income is involved, but also, especially and predominantly, the rights of the public to have interstate commerce conducted according to law and free from unjust discrimination. In no other way, could the adequacy and efficiency of the carrier service be preserved unless the carrier was at liberty to impose on other traffic, including interstate traffic, the burden which the method of court procedure would enable the intrastate traffic unjustly to escape.

When, after this decision, the case went back to the lower court, that court could not, with legal propriety, enter a decree different, or varying in purpose or scope, from the order of this Court; that is, a decree that the order of the Interstate Commerce Commission be "set aside" because not supported by proper findings, but with the limitation which this Court had expressed, that the Commission was still at liberty, in the pending proceedings, to make appropriate findings; if justified by the facts as found in the re-hearing to support the ultimate conclusion that the State rates constituted an undue burden on the revenues of the carrier and, consequently, were an unjust discrimination against interstate commerce and must be set aside and proper state rates charged.

Defect Cured in Re-opened Proceedings.

In fact, when the case did go back to the Commission, no new proceeding was started, but the original proceeding was reopened by the Commission's order of April 6, 1931 (R. 61), and the issues there presented were re-examined on the principles laid down by the Supreme Court (186 I. C. C., 157, 187, 188).

It would have been competent for the Commission to decide the case on the record then before it, and if it had found therein proper basis to justify, and had made, the findings held to be essential and to be lacking, there would be no doubt that its findings would have related to the conditions existing at the time of its original order and its order would speak as of the original date. That power of the Commission was not lessened by the fact that, on the re hearing it considered not only the original record but afforded to all parties an opportunity to introduce any additional evidence desired.

In addition to the evidence already in the record, exactly the same kind of evidence was introduced and considered on the re hearing as might have been introduced and considered on the first hearing and this new evidence, as well as the old, related to the same time and to the same status as were then under consideration.

This abundantly appears from the report of the Commission on the re hearing (186 I. C. C., 157). To show the transportation conditions in Florida, the traffic density was determined by a review of the statistics of years 1921 to 1930, inclusive (p. 164); the railroad mileage in Florida was shown by a comparison of the mileage in 1921 with the mileage in 1930 (p. 164); the character of the traffic, as between low grade and other traffic, was shown by results of a traffic test made for the month of May, 1926 (p. 165); the property investment of the carrier and its

rates of return were shown by reference to the years 1926, 1929 and 1930 (p. 166); the importance of the log traffic was shown by reference to volume in the five-year period 1926-1930 (p. 166); the small revenue derived from the log traffic was shown by reference to the years 1928, 1929 and 1930 (p. 166), and the Commission on this evidence found the Cummer scale rates to be "abnormally low", and reaffirmed in this hearing (on evidence similar to that submitted on the previous hearing) its finding on the previous hearing that the Florida state rates (the Cummer scale) were "less than reasonably compensatory" (p. 165).

The Commission says (p. 187):

> "*Conclusions and findings.*—In determining whether the Cummer Scale results in unjust discrimination against interstate commerce the fundamental question, in the language of the Supreme Court * * *, is whether the traffic moving on that scale pays 'a fair proportionate share' of the cost of 'maintaining defendant, or whether it causes an undue revenue burden upon the interstate traffic of defendant. The record shows the low earnings of the defendant'; (shown by the results of the years 1927, 3.70 per cent; 1928, 3.52 per cent; 1929, 4.53 per cent; and 1930, 2.54 per cent, p. 166); 'the low earnings on its log traffic as compared with its earnings on other low-grade commodities'; (shown by the traffic test for the month of May, 1926, p. 165) 'the much lower earnings on its Florida log traffic than on its interstate log traffic'; (shown by results for periods prior to original report herein, p. 153 and 193); 'and the much lower level of the Cummer scale than of other scales applicable interstate and intrastate throughout the South' (shown by reference to conditions including those existing prior to original report herein, p. 162, 163, 194, 195). 'These facts and the cost evidence clearly warrant the conclusion that the traffic moving under the Cummer Scale does not pay its 'fair proportionate share' of operation and maintenance alone."

In rendering its decision, on April 2, 1934, on the second appeal in this case, the Supreme Court clearly indicates that the Court realized and approved the scope of the evidence, and the time to which it applied, considered by the Commission on the re-hearing and that the Commission was dealing with conditions existing at the time of the first hearing, for the Supreme Court states (290 U. S., p. 9), that: "On the new hearing, the Commission made comprehensive findings to supply what had thus been found to be lacking". Or, in other words, the Commission was simply supplying now what it should have supplied on the original hearing—and proceeds:

> "The findings set forth at length transportation conditions (186 I. C. C., 160-189) • • •
>
> Reviewing the history of the Cummer scale of intrastate rates on logs, and considering comparable interstate and intrastate rates, the Commission found that the Cummer scale was abnormally low and less than reasonably compensatory; that the defendants' revenue under the Cummer scale was 'insufficient under all the circumstances and conditions to cover the full cost of service'."

To support this statement as to the findings of the Commission, the Supreme Court explicitly refers to pages 165 and 187 of the Commission's report. It was on these pages that it is apparent the Commission used the evidence and the periods referred to, to justify its conclusions hereinbefore stated.

This Court has decided that evidence as of 1928 cannot support an order made in 1931. Much less could it support one speaking as of 1932. In *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 284 U. S. 248, this Court said:

> "It is plain that a record which was closed in September 1928—relating to rates on a major description

> of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements. While the effects of the widespread economic disturbance have had a progressive manifestation, they had been sufficiently revealed in February, 1931, when the second petition for rehearing was made, to compel the conclusion that the record of 1928 afforded no sufficient basis for the order of the Commission" (260-261).

A similar statement appears in *Los Angeles R. etc., v. Railroad Commission*, 289 U. S., 287. In the opinion in that case this Court said at page 311:

> "But we know that the estimates of present value, taken as the cost of reproduction as of December 31, 1929, based upon average prices from 1926 or 1927 to 1929, furnished no dependable criterion of values in the succeeding years. The country was facing a most serious decline in prices. It was entering upon a period of such depression as to constitute 'a new experience to the present generation'. It was not the usual case of possible fluctuating conditions but of a changed economic level" (311, 312).

These findings thus approved by this Court appear uncontrovertibly to have been based on evidence speaking as of 1928. These findings so made supported the "ultimate conclusion" of the Commission. This "ultimate conclusion" so sustained must have been a conclusion, speaking as of 1928, as to the burdensome effect of interstate commerce of the Cummer scale of intrastate rates in Florida. It is submitted that this 1928 order of the Commission is now shown to have been proper and that the rates which Atlantic Coast Line Railroad charged in compliance with the requirements of that order were the only lawful rates

and therefore no restitution can properly be awarded against it because it charged these rates.

Precedents.

Even if it were necessary to construe the second order of the Commission retroactively and as having relation to the status, as to unjust discrimination, as of the time of its first order, subsequently sustained, there would be involved no legal anomaly but ample support in precedent. It should be considered in this connection that the ground subsequently sustained by the Supreme Court for upholding the second order of the Commission—expressed in the first, although not as to the first sustained by adequate findings—was the revenue ground which declared that the Florida State traffic in logs was not making its proper contribution to the revenues of the interstate carrier necessary to prevent an undue burden on the carrier's interstate business and to enable it to perform properly its transportation duties. The right to such adequate contribution from the Florida State traffic was not only a right of the carrier but also a right of the public interested in adequate transportation and the proper distribution of the burden of sustaining it. This interest was just as pronounced and just as necessary to protect in the interval between the first order of the Commission and the second order as it was after the second order. In order to protect the carrier's interest and this very substantial public interest it is necessary to construe, if the facts justify it as hereinbefore contended, the Commission's order as relating to the status existing at the time of its first order and to all subsequent periods while the order is in effect. A precedent for this is found in the back mail pay case, *United States* v. *New York Central*, 279 U. S. 77-8-9.

In that case, the Commission, under the statute, provi-

sions from which are quoted below, undertook to perform the duty thereby imposed upon it of fixing the just compensation of the railroad for carrying the mail. At first it expressed the opinion that, under the statute, it had "authority to establish rates only for the future," and made orders establishing rates as fair and reasonable after the date of the orders. On further hearings, however, it made new orders establishing the same rates as fair and reasonable for the times between the filing of the applications and the orders previously made. The question was as to the authority to make these new orders applicable to and covering the back interval between the filing of the applications and their first orders.

The statute provided:

> "All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith."

It further provided for application from time to time to the Interstate Commerce Commission to establish by order a fair, reasonable rate or compensation to be paid at stated times. (U. S. C. A. Title 39, 541, 551.)

Carriers filed applications with the Interstate Commerce Commission for a readjustment of the compensation for services in carrying the mails rendered by them, from dates before the application and for the future.

Having, by a subsequent order, fixed the compensation for the period between the filing of the applications and their first order, the question of the Commission's power to enter the second order was carried to the Supreme Court.

This Court held that:

> "• • • it is a natural incident of its judisdiction" (of the Commission) "that it should be free to treat its decision as made at once. Obviously Congress intended the Commission to settle the whole business, not to leave a straggling residuum to look out for itself, with possible danger to the validity of the Act."

The Court stated that it was "quite aware that minutiæ of expression may be found that show Congress to have been thinking of the future," but put its decision "on the reasonable implication of an authority to change the rates of pay which existed from the day when the application was filed, the manifest intent to refer all the rights of the railroads to the Interstate Commerce Commission and the fact that unless the Commission has the power assumed, a part of the railroads' constitutional rights will be left in the air." (*United States* v. *New York Central*, 279 U. S. 77-79.)

II.

The lower court was entirely without jurisdiction to determine whether restitution was due by this appellant in the circumstances of this case; or itself to fix, as the rate which should have been charged during the 1929-1931 period, a rate different from that prescribed by the Interstate Commerce Commission as necessary to remove the burden on interstate commerce. (Points 4, 5, 6 and 8.)

The three-judge court was without authority to award restitution. Its order making such award was obviously entered on the theory that the Commission's 1928 action in respect to the Florida state rates was completely void and that the claim for restitution, being based on past transactions, presented a judicial question which it was within the power of the court to pass on without previous action

by the Commission. It is respectfully submitted that both of these assumptions are erroneous.

That the Commission's order was merely erroneous and not void will abundantly appear from the foregoing discussion.

That the court could not fix rates and award restitution, even as to past transactions, without previous action by the Commission, is abundantly established by the case of *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U. S. 291.

In this case, the power of a court to proceed before the Commission had acted (and if the Commission's order was void, it had not acted) is discussed in a very thorough and illuminating manner. The Court says:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." (Page 291.)

It will be observed that it is here distinctly held that, while the determination of what rate shall be deemed reasonable for the future is a legislative or administrative function and the determination of whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function, *preliminary resort to the Commission is required alike in both cases.*

This proposition of law has been affirmed many times by the Supreme Court in other cases than the one above cited.

Texas & Pacific R. Co. v. *Abilene Oil Co.*, 204 U. S. 426;
Balto. & Ohio v. *Pitcairn*, 215 U. S. 481;
Robinson v. *B. & O. R. Co.*, 222 U. S. 506;
Board v. *Great Northern Ry.*, 281 U. S. 412.

Other cases cited 259 U. S., bottom page 295.

The argument sustaining the proposition of law here enunciated is given with elaboration in the case of *Board* v. *Great Northern Ry.*, 281 U. S. 421, *et seq.*

> "The controlling principle, thus invoked," the Court says, "was derived from a consideration of the nature of the question and of the inquiry and action required for its solution. The inquiry would necessarily relate to technical and intricate matters of fact, and the solution of the question would demand the exercise of sound administrative discretion. The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision. Only through action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend," and the Court adverts to "the destructive effect upon the system of regulation adopted by the Act to Regulate Commerce if it were construed as giving authority to the courts, without the preliminary action of the Commission, to consider

and pass upon the administrative questions which the statute has primarily confided to that body."

(See list of cases at bottom of p. 423.)

It is obvious that if restitution could be awarded by the courts without reference to the standards fixed by the Commission, there could be no uniformity of right, as each court in any territorial jurisdiction might act on a different standard.

If a court could award restitution of the difference between rates which it fixed and the rates at first temporarily rejected but afterwards upheld, after appropriate action by the Interstate Commerce Commission, as necessary to avoid unjust discrimination against interstate commerce, there would be no way of securing interstate commerce during the period covered by such disputed rates against unlawful discrimination against it of intrastate rates, for if that could be done the unlawful discrimination must be effective during that period, and the court proceedings would amount merely to a method of violating the law. Accordingly it is not competent, under these circumstances, for any court to hold that different rates fixed by it should have been charged and to award restitution, for to do so would by court action tend to create and to justify unjust discrimination against interstate commerce, which the statute in terms prohibits and declares to be unlawful, and which the Commission, with the approval of the courts, avoids by prescribing anew the rates originally complained of. Any other conclusion would result in legalizing by court action unjustly discriminatory rates declared by the statute to be illegal.

That such a result would be inevitable is obvious when it is considered that paragraph 4 of Section 13 of the Interstate Commerce Act explicitly declares that unjust dis-

crimination against interstate commerce by state rates "is hereby forbidden and declared to be unlawful," and, when appropriate preliminary action has been taken by the Commission, this becomes operative and imperative. Until such appropriate preliminary action, the courts can do nothing. (*Great Northern* v. *Merchants Elev. Co.*, 259 U. S. 291.)

There must be something wrong about a procedure which results in establishing and giving judicial endorsement to rates which violate the explicit terms of valid statutory law and are contrary to rates once authorized by the Commission and subsequently reapproved by it as necessary to avoid unjust discrimination against interstate commerce.

Attention is here again called to the fact that any other method of treating the subject than to let the Commission's rates twice declared by it as necessary to avoid the prohibited discrimination, speak as of the time its first order was made, would be the creation by processes of the courts of the unlawful and forbidden discrimination, a result which the courts will not permit or countenance if it can be avoided by the simple device of treating the rehearing before the Commission as similar to a rehearing by the lower court in a law case, especially when it is remembered that not to do so would force the carrier to make up the revenue unjustly lost by imposing an additional burden on other and innocent traffic. Ample precedent for pursuing the course suggested is found in the case of *United States* v. *New York Central, supra.*

The proper method of treating such a problem as here presented if raised by an appeal from a lower court is stated by this Court in *Lawrence* v. *St. Louis-San Francisco R. Co.*, 278 U. S. 228, 232. In referring to its action on the first appeal, where the injunction was held to be unwarranted, the Court, in an opinion affirming the final action of the lower court, said:

> "It is true that this Court has held that the interlocutory decree was improvidently granted. *But it did not declare that the decree was void.* 274 U. S. 588 591 592. Compare *Arkansas Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 274 U. S. 597 598. The interlocutory injunction, until dissolved by our decision, was in full force and effect." (Italics ours.)

Perhaps more nearly in point is *Railroad Commission* v. *Maxcy*, 281 U. S. 82, 83, where this Court sent the case back to the lower court for lack of findings, or of a statement by the district court of the ground of its decision. When this case came back to this Court in *Railroad Commission* v. *Maxcy*, 282 U. S. 249, this Court said, at page 250 and 251:

> "Obeying our mandate the court below made proper findings and entered a final decree July 5, 1930. • • • After examining the findings and conclusions, and the record upon which they are based, we can find no adequate reason for disapproving the result reached by the court below. Its decree will be affirmed."

The method thus adopted by this Court in dealing with appeals from a lower court is not only appropriate but is easily adaptable in order to prevent the violation of a statute of the United States in a case involving an order of the Commission, where it is sent back to the Commission by this Court simply to supply findings which were then lacking.

III.

Equity will not permit its processes to accomplish a result declared by the Congress to be unlawful.

Entirely independent of and in addition to the contention advanced above, it must be remembered that this restitution proceeding was in a court of equity. If private rights alone were involved, the applicant, in order to obtain relief, must come into court with clean hands and ready

to do equity. Such a requirement of the applicant cannot be less controlling when he comes refusing to bear his just proportion of the burden of sustaining the carrier and is asking the court to enter an order undeniably violating the express provision of the statute that unjust discrimination against interstate commerce is forbidden and declared to be unlawful. A court of equity will not lend itself to such a subversion of the statutory law or to the accomplishment of such an unlawful result. Courts of equity never permit the use of their powers except for the purposes of right conscience.

If restitution is to be awarded in a case like this and under the circumstances here disclosed, it will constitute a destruction, *by action of the courts*, of one of the most substantial and important of the regulatory provisions introduced into the Interstate Commerce Act by the Amendments of 1920, the high purpose and scope of which have been hereinbefore discussed.

CONCLUSION

The establishment of the principles here contended for is of the utmost importance to the public and to a well ordered system of jurisprudence, as well as to the carriers themselves.

Unless the Commission was without jurisdiction and hence its order void *ab initio*, or unless the Commission, upon the reference back to it, should find from the evidence that the sustaining facts do not exist, its order removing the unjust discrimination supported by proper findings must be treated by the courts as accomplishing the result contemplated by the statute. This conclusion is emphasized *by the public interest* in the question hereinbefore developed.

Accordingly, stripped of all disguise, if the restitution applied for in this case is granted, it must be awarded under and notwithstanding the following facts:

1. The amount of restitution which was asked was necessary to be paid by the applicants in order to avoid the unjust discrimination forbidden by statute.

2. If that, or any amount, be now repaid to them, the unjust discrimination, forbidden by statute, will be created.

3. This unjust and forbidden discrimination will not be created by the carriers nor by the Commission, but by the courts through the methods they adopt in using their judicial processes.

4. If restitution be awarded as asked, and the carrier is to receive what it is entitled to and the public is to be provided with adequate and efficient service, then it will be necessary for additional revenue burdens to be placed on innocent traffic in order that these applicants may enjoy the "forbidden fruits" of rates which the statute prohibits and declares to be unlawful.

It is therefore respectfully submitted that the District Court erred in awarding restitution in this case; that no amount whatever is due by this appellant; and that the decree appealed from should be reversed and judgment entered for appellant.

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January 2nd, 1935.

APPENDIX.

Showing Concurrent Action by Interstate Commerce Commission in Reopened Docket 18364 and Action by District Court in Restitution Proceedings.

District Court

January 5, 1931—Opinion of Supreme Court in Florida v. United States, 282 U. S. 194.

February 28, 1931, and March 2, 1931—Motions for decree in accordance with mandate and for restitution by Atlantic Coast Line to log shippers; said restitution to be measured by the difference between the Cummer intrastate scale and the rates collected by A. C. L. in 1929-1931 under the order of the Interstate Commerce Commission. Filed by Brooks-Scanlon Corporation, et al., in #511 (R. 7); and by State of Florida, et al., in #514 (R. 15). By Wilson Lumber Company in #512 (R. 11).

March 7, 1931—Response by Atlantic Coast Line to motions (R. 27). In this response is set up the fact that motions have been filed with Commission for the reopening of Docket 18364 (R. 41).

March 7, 1931—Decree, purporting to be in accordance with mandate, in which the August 1928 order of the Commission is "enjoined, set aside and annulled"; and jurisdiction is reserved for the consideration of all other questions. (R. 53, 54 and 55);

March 17, 1931—Amended response of Atlantic Coast Line praying, *inter alia*, that court withhold action on restitution "until the Interstate Commerce Commission shall have acted upon" motions filed with it for reopening of Docket 18364 and while said Commission is proceeding "to make the determinations which this situation does require." (R. 57, 58.)

April 15, 1931—Second amendment of response of Atlantic Coast Line, setting out order of Commission of April 6, 1931, reopening Docket 18364 and praying that action by court be "withheld pending the action of the Interstate Commerce Commission" in said reopened proceeding. (R. 60, 62).

INTERSTATE COMMERCE COMMISSION
in Re-opened Docket 18364

March 5, 1931—Motion filed with Interstate Commerce Commission for reopening of Docket No. 18364 and making of necessary findings.

April 6, 1931—Order of Interstate Commerce Commission reopening Docket No. 18364 "for further hearing" and assigning for hearing at Jacksonville, Florida, on May 4, 1931. (R. 61).

DISTRICT COURT

July 31, 1931—Decree denying prayers of Atlantic Coast Line and referring to master to ascertain and report sums due by Atlantic Coast Line as overcharges exacted "by virtue of said invalid order of" the Commission and measured by the difference between the amount collected and "the established lawful rate in force at the time of each shipment." (R. 65).

January 29, 1932—Answers of A. C. L., setting up, *inter alia*, fact that in reopened Docket 18364 a report proposed has been filed and praying that action by the court be withheld "until the Commission shall have determined whether or not there should be restitution by this respondent" and shall have "fixed the standard to be applied."

February 17, 1932—Petition of Master for instructions as to right of Atlantic Coast Line to show Cummer scale to be unreasonable, unjust, confiscatory and void. (R. 67).

March 18, 1932—Decree on petition of Master. "We have held * * * that the attacked order" of the Interstate Commerce Commission "is void and can itself give 'A.C.L.' no aid or protection". As to the Cummer scale: "We intended to refer such contentions to the Master for his investigation and decision", etc. (R. 69).

November 14, 1932—Report of Master holding Cummer scale of rates to be confiscatory and void and therefore no measure of restitution (R. 70, 86, etc.); and that there being no lawful established rate in Florida and the rates charged by the Coast Line having been charged "without any lawful authority", the court has the right to determine whether the charges so made were unreasonable and, if so, to determine "what would have been the proper rate to have been charged", etc. (R. 88).

Also, that the orders of the Interstate Commerce Commission, "whether passed before or since" the 1931 decision of the Supreme Court are "*not* admissible as evi-

INTERSTATE COMMERCE COMMISSION
in Re-opened Docket 18364

May 4, 1931—Hearings in reopened Docket No. 18364 begun, pursuant to order of April 6, 1931.

July 5, 1932—First report and order of Interstate Commerce Commission in re-opened Docket No. 18364 (186 I. C. C., 157) subsequently sustained by the District Court, and by the Supreme Court in its April 2, 1934, opinion (290 U. S. 1) in which the Supreme Court said:

> "On the new hearing, the Commission made comprehensive findings to supply what had thus been found to be lacking."

September 14, 1932—Argument on bills filed by Florida shippers to enjoin (190 I. C. C. 589).

dence of the propriety of the charges made by Atlantic Coast Line." (R. 90).

January 30, 1933—Opinion and decree affirming report and holding Cummer scale confiscatory. Re-referring to Master to find whether charges made by Coast Line were reasonable "as measured by common law standard" and if not "what was the reasonable charge to be made." (R. 159, 172).

March 15, 1933—Petition of Coast Line for decree in its favor, since the court has held void the basis on which restitution sought. If not, that court withhold action until claimants shall have submitted their claims to Interstate Commerce Commission. In default of above, that reference to Master be broadened to permit offset by Atlantic Coast Line of its claim for proper charges during period 1931-1933 when only Cummer scale was collected—under protest. (R. 173, 184).

March 21, 1933—Decree refusing petition above. (R. 186).

November 7, 1938—Second report of Master awarding restitution of 34% of difference between Cummer scale and the scale prescribed by Interstate Commerce Commission. (R. 188, 220).

INTERSTATE COMMERCE COMMISSION
in Re-opened Docket 18364

January 9, 1933 –Second report and order in re-opened docket 18364 (190 I. C. C. 588).

February 24, 1933—Opinion and decree of three-judge District Court refusing to enjoin orders in re-opened Docket No. 18364. Subsequently affirmed by Supreme Court April 2, 1934.

February 25, 1933—Rates prescribed by Interstate Commerce Commission made effective.

DISTRICT COURT

January 26, 1934—Opinion sustaining Master's report; stating, in "Findings of Fact":

> "In view of the experience of the Interstate Commerce Commission and its full and repeated consideration of these very rates, we should have inclined to think the rates which they fixed • • • ought to be accepted as the fair charge. Against this, however," etc. *"If the ideal rates be those fixed by the Commission, the ideal might with reason and justice have been approached less precipitately."* • • • (R. 349, 353 and 354.)

April 14, 1934—Amendment to motion of Atlantic Coast Line wherein it set up the April 2, 1934, decision of the Supreme Court and prayed that, in the light of that decision, the District Court withdraw its January 1934 opinion (R. 360, 368).

April 17, 1934—Final decree—here appealed from—awarding restitution as found by Master (R. 383).

April 2, 1934—Opinion of Supreme Court upholding the orders of the Commission in Docket No. 18364.

"On the new hearing, the Commission made comprehensive findings to supply what had thus been found to be lacking" • • •

"We perceive no ground for the contention that the Commission has failed to make the basic findings necessary to support its ultimate conclusion." (292 U. S., at pages 9 and 11.)